2052.

SUPREME COURT OF THE UNITED STATES.

No. 71.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX, PL'FFS IN ER.,

vs.

DAVID C. WALLACE.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Declaration	1	1
Defendant's pleas	6	3
Replication and demurrer to defendant's pleas	15	6
Causes of demurrer	21	8
Joinder in demurrer	21	8
Demurrer sustained	22	9
Defendant's demurrer to replication, and leave granted defendant's to amend	22	10
Defendant's replication to amended plea	23	10
Issue joined, &c	25	11
Jury sworn—verdict and judgment	26	11
Bill of exceptions	28	11
Writ of error	50	20
Bond	52	20
Citation and service	53	21
Clerk's certificate	54	21
Assignment of errors	55	22

Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and fifty-seven, before the Hon. John McLean, one of the associate justices of the Supreme Court of the United States, and the Hon. Elisha M. Huntington, judge of said district of Indiana.

Circuit court of the United States, for the district of Indiana.

DAVID C. WALLACE, a citizen and resident of the State of Ohio,
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX, citizens and residents of the State of Indiana. } No. 29.

Be it remembered, that heretofore, to wit, on the 6th day of November, in the year 1856, the plaintiffs, by N. C. McLean, his att'y, filed their declaration in the above entitled cause in these words and figures, to wit:

David C. Wallace, a citizen and resident of the State of Ohio, complains of the board of commissioners of the county of Knox, citizen and residents of the State of Indiana, a corporation created by the statute of the State of Indiana, approved June 17th, 1852, in a plea of assumpsit, for that whereas the said defendants, by virtue of the powers conferred upon them by an act of the General Assembly of the State of Indiana, entitled "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," approved January 15th, 1849, did lawfully and in due form, for a valuable consideration, execute and issue certain bonds under the seal of the said county of Knox, and the signatures of the president of the board of commissioners and the auditor for the said county of Knox, all of said bonds bearing date the 1st day of March, 1852, whereby the defendants acknowledged themselves indebted to the Ohio and Mississippi Railroad Company or bearer, in each bond so executed and issued as aforesaid, in the sum of one thousand dollars, payable twenty-five years from the date thereof, at the North River Bank, in the city of New York, upon the presentation and delivery of said bonds, bearing an interest of six per cent. per annum, payable annually on the first day of March in each and every year until the maturity of said bonds at the said North River Bank, in the city of New York, upon the presentation and delivery of the proper coupons thereto attached,

signed by the auditor of said county. And whereas the plaintiff, for a valuable consideration, has become the legal owner and bearer of certain of said bonds, and the coupons thereto attached, as hereinafter set forth, to wit, bonds numbered from fourteen to fifty-three, inclusive, and the defendants have failed to pay the annual instalments of interest on the portion of said bonds numbered from twenty-nine to fifty-three, inclusive, as they promised to do to plaintiff, the bearer thereof, as called for by the proper coupons thereto attached, for the sum of sixty dollars each, signed by Abram. Smith, auditor, meaning the auditor of the said county of Knox, for Ohio and Mississippi railroad subscription, and payable to bearer at the North River Bank in the city of New York, on the first days of March, in the years 1855 and 1856, and also the annual instalment of interest on said bonds, numbered from fourteen to twenty-eight, inclusive, as they promised to do, the plaintiff, the bearer thereof, as called for by the proper coupons thereto attached, for the sum of sixty dollars each, signed by Abram. Smith, auditor, meaning the auditor of Knox county aforesaid, for Ohio and Mississippi railroad subscription, and payable to bearer at the North River Bank in the city of New York, on the first day of March, 1856, by which said coupons, being sixty-five in number, and for the sum of sixty dollars each, for Ohio and Mississippi railroad subscription, and signed by Abm. Smith, auditor as aforesaid, the defendants promised to pay the plaintiff, who is the legal owner and bearer thereof, on the first day of March, 1855, the sum of fifteen hundred dollars, at the North River Bank, in the city of New York, and also the sum of twenty-four hundred dollars on the first day of March, 1856, at the North River Bank, in the city of New York; making in all the sum of thirty-nine hundred dollars, which the defendants promised to pay the plaintiffs in the manner and form, at the place and date above set forth, which said date or time has now elapsed; and the said defendants then and there, in consideration of the premises, promised to pay to the said plaintiff each of said coupons, and the sum total thereof according to the tenor and effect thereof, yet the said defendants have disregarded the promises so made, and have not paid the said sum of money, or any part thereof.

And whereas the defendants afterwards, on the first day of October, 1856, in consideration of the premises, then and there promised to pay the said last mentioned several sums of money to the plaintiff on request, yet they have disregarded their promises, and have not paid the said several sums of money, nor either of them, nor any part thereof, to the damage of the plaintiff ten thousand dollars, and thereupon he brings suit, &c.

By N. C. McLEAN, *his Att'y.*

And afterwards, to wit, at a circuit court begun, continued, and holden before the Hon. Elisha M. Huntington, in the district

aforesaid, on the 27th day of November, 1856, now come the parties, and this cause is continued until the next term of this court.

And afterwards, to wit, at a circuit court holden at Indianapolis, in the district aforesaid, on the 30th day of May, 1857, before the same judges as first above said, now come the parties, and the defendants file the several following pleas, in these words, to wit:

And the said board of commissioners of the county of Knox come and defend the wrong and injury, when, &c., and say that they did not assume and promise in manner and form as the plaintiff has above declared against them, and of this they put themselves upon the country, &c.

McDONALD, HOVEY, & PORTER,
Def'ts Att'ys.

The undersigned swears that the above plea is true in substance and in fact, as he verily believes, because he is informed and believes that said coupons were issued without due authority.

JNO. B. PATTERSON.

Sworn and subscribed in open court, May 29, 1857.

H. BASSETT, *Clerk.*

And for a further plea in this behalf, the defendants say actio non, because they say that the said supposed bonds and coupons are illegal and void in this, to wit, that the same were issued in pursuance of a supposed election and vote of certain voters of said county of Knox to determine whether said county should through these defendants subscribe for stock in the said Ohio and Mississippi Railroad Company, pursuant to said act, entitled "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," approved January 15, 1849; and the defendants say that upon the passage of said act, the then sheriff of said county did not forthwith give notice of said election to be held in said county on the first Monday of March then next, to determine whether said county should subscribe for said stock, in the manner then prescribed by the laws governing general elections in the State of Indiana. Nor was such notice given at any time; and that at no time after the said first Monday of March, 1849, were such election and voting ever held in said county of Knox for the purpose aforesaid, and this the defendants are ready to verify; wherefore they pray judgment, &c.

3. And for a further plea in this behalf, the defendants say actio non, because they say that the supposed bonds and coupons mentioned in the declaration were and are part and parcel of 200 bonds with the coupons, of like denomination, amounts, and coupons, each, with each of the bonds, (with the coupons thereto attached,) named in the declaration; that all said 200 bonds, with the coupons thereto attached, including the bonds and coupons

mentioned in the declaration, were issued solely in consideration and pursuance of a subscription made before the execution of said bonds and coupons by the defendants to the stock of the Ohio and Mississippi railroad, amounting to $200,000, and in pursuance of no other object, and for no other consideration whatever; that the defendants did not at any time within one week before the first Monday of March, 1849, or at any time before that day, determine to increase, nor did they in any manner increase, the subscription of 100,000 dollars to said stock, mentioned in the act of Jan. 15, 1849, referred to in said declaration, to the said sum of 200,000, or to any other sum whatever; and that at no time after the first Monday of March, 1849, was any election or voting held or had in said county by the voters thereof, or by any of them, to determine whether said county should subscribe for the stock of the Ohio and Mississippi Railroad Company. And so the defendants say that said subscription of 200,000 dollars of stock in said company was made, and said bonds and coupons (including the coupons sued on in this action) were executed and issued, in violation of the said statute, and are and were wholly illegal and void, and this they are ready to verify; wherefore they pray judgment, &c.

4. And for further plea in this behalf, the defendants say actio non, because they say that there is no record in the court of the board of commissioners of the county of Knox of any authority of the defendants to Abm. Smith, auditor as aforesaid, empowering him to make, execute, or deliver the coupons in the declaration mentioned in manner and form, as therein alledged; wherefore they pray judgment, &c.

5. And for a further plea in this behalf, the defendants say actio non, because they say that the supposed bonds and coupons in the declaration mentioned were and are part and parcel of 200 bonds with coupons, each of like denomination, amount, and coupons, with each of the bonds (with the coupons thereto attached) named in the declaration, and all made and issued at the same time; that said bonds and coupons, including those mentioned in the declaration, were issued in consideration and pursuance of a subscription by the defendants to the stock of the Ohio and Mississippi Railroad Company, under the act of Jan. 15th, 1849, named in the declaration, and for no other purpose or consideration whatever, which subscription was made on the 25th day of October, 1850; and the defendants aver that said 200 bonds, with the coupons thereto attached, including the bonds and coupons named in the declaration, were contrary to the form of the statute aforesaid; all executed and issued, to the full amount of said subscription of $200,000, at one and the same time, to wit, on the first day of March, 1852, and not at the rate of one-fifth each year from the time of said subscription, as required by said statute; wherefore the defendants say that the bonds and coupons named in the

declaration are and were illegal and void, and this the defendants are ready to verify; wherefore they pray judgement, &c.

6. And for a further plea in this behalf, the def'ts say actio non, because they say that the supposed bonds and coupons in the declaration mentioned were and are part and parcel of 200 bonds with the coupons, each of like denomination, amount, and coupons with each of the bonds (with the coupons) named in the declaration; that said bonds and coupons, including those mentioned in the declaration, were issued pursuant to, and in consideration of, a subscription (made by the defendants before the issuance of said bonds and coupons) to the stock of the Ohio and Mississippi Railroad Company, under the said act of January 15, 1849, and pursuant to no other purpose, and for no other consideration whatever; which subscription of stock was for the sum of $200,000; that the only election ever held in said county to determine by popular vote whether said county should subscribe for stock in said railroad company, was held on the first Monday of March, 1849; that within one week prior to said election, to wit, on the 26th day of February, 1849, the county board of said county determined to increase, and so far as was then in their power did increase the subscription of $100,000 mentioned in said act to the sum of $200,000, by an order on their record in the words and figures following, to wit: "Ordered by the board, that the county of Knox subscribe two hundred thousand dollars to the capital stock of the Ohio and Mississippi railroad;" which order was made at a special term of said board in regular session, as by the record thereof appears; and that of said action and order of said board so increasing said stock from $100,000 to $200,000, no notice was given at the different precincts of said county on the day of said election, to wit, on the first Monday of March, 1849; yet the board of commissioners of the county of Knox did, pursuant to said election and the vote thereat taken, and pursuant to no other object, by no other authority, and for no other consideration whatever, afterwards make the subscription of $200,000 first above in this plea mentioned, and issue all the bonds and coupons above in this plea mentioned; and so the defendants say that said coupons named in the declaration were made and issued in violation of the act aforesaid, and are and were wholly null, void, and illegal, and this the defendants are ready to verify; wherefore they pray judgement, &c.

7. And for a further plea in this behalf, the def'ts say actio non, because they say that on the first day of November, 1851, there did not exist, nor at any time before that day did there exist, any valid contract between the defendants and the president and directors of the Ohio and Mississippi Railroad Company, or between the defendants and any other person whatever, touching any subscription for any stock in said company; that the bonds and coupons mentioned in the declaration were, after the first day of

November, 1851, made, executed, and issued to said company in consideration of certificates of stock in said company to the defendants and of the purchase and subscription of *of* such stock, and for no other consideration whatever; wherefore, the defendants say that said coupons are illegal and void, and this they are ready to verify; wherefore they pray judgement, &c.

HOVEY, McDONALD, & PORTER,
Def'ts Att'ys.

And afterwards, to wit, at a circuit court begun, continued, and holden at Indianapolis, in said district, on the 1st day of June, in the year aforesaid, that being the 13th judicial day of said term, before the same judges as aforesaid, comes now the plaintiff, by his attorney, and files his replication and demr to 2d and 6th pleas, in these words and figures:

1. And the said plaintiff as to the plea of the said defendants by them first above pleaded, and whereof they put themselves upon the country, doth the like.

3. And the said plaintiff as to the said plea of the said defendants by them thirdly above pleaded to the said declaration, saith that he, by reason of anything by the said defendants in that plea alledged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendants, because the said defendants did on a certain day before the first day of March, 1849, to wit, on the 26th day of February, 1849, at a meeting of the board of commissioners of Knox county, began and held at the court-house in Vincennes, within said county, order by the board that the county of Knox, the defendants, subscribe $200,000 to the capital stock of the Ohio and Mississippi railroad; and an account thereof, on the 1st Monday of March, 1849, an election was held and voting was had in said county of Knox, by the voters thereof, according to the provisions of the law in such case made and provided, to determine whether said county should subscribe as aforesaid for the stock of the Ohio and Mississippi Railroad Company, and that the majority of the voters voting at said election voted in favor of said subscription; and so the plaintiff says that the said subscription of $200,000 as to the stock of said Co. was made, and said bonds and coupons in the declaration mentioned were executed and issued, in conformity with the provisions of the statute in such case made and provided, and this the said plaintiff is ready to verify; wherefore he prays judgment, &c.

4th. And the said plaintiffs as to the fourth plea by the said defendants above pleaded to the said declaration, saith that by reason of anything by the said defendants in that plea alledged, he ought not to be barred from having and maintaining his aforesaid action against the said defendants, because he says that at a meeting of the board of commissioners of the said county of

Knox, held at the court-house in Vincennes, within said county, on the 25th day of October, 1850, the defendants did, by an order made and entered on their records, authorize and require the auditor of said county, to wit, the said Ab'm Smith, to issue the bonds of said county in the declaration mentioned, and in the manner and form therein alledged, and this the said plaintiff is ready to verify; wherefore he prays judgment, &c.

5. And the said plaintiff to the fifth plea by the said defendants above pleaded to the said declaration, saith that by reason of anything by the said defendants in that plea alledged, he ought not to be barred from having and maintaining his aforesaid action against the said defendants, because he says that the *the* defendants did subscribe on the 25th day of October, 1850, for four thousand shares of $50.00 each of the capital stock of the Ohio and Mississippi Railroad Company, amounting to the sum of $200,000; and on account of said act and in payment of said subscription the defendants were authorized to issue, on said 25th day of October, 1850, forty of said bonds, being part of those in the declaration mentioned, numbered from 14 to 40 inclusive; and also on the 25th day of October, 1851, the defendants were authorized to issue forty more of said bonds, being part of and the remainder of those in the declaration mentioned, numbered from 41 to 53 inclusive; and that all the bonds and coupons in the declaration mentioned the defendants were authorized and empowered to issue as aforesaid, to wit, on the days and years aforesaid, and were issued afterwards, to wit, on the first day of March, 1852; wherefore the plaintiff says that the said bonds and coupons named in the declaration are legal and valid, and this the said plaintiff's prays may be inquired of by the country, &c.

7th. And the said plaintiff as to the seventh plea by the said defendants above pleaded to the said declaration, saith that by reason of anything by the said defendants in that plea alledged, he ought not to be barred from having and maintaining his aforesaid action against the said defendants, because he says that the defendants did by an order entered upon their records on the 26th day of February, 1849, order that the county of Knox subscribe $200,000 to the capital stock of the Ohio and Mississippi Railroad Company, which said subscriptions was afterwards, to wit, on the 1st Monday of March, 1849, submitted to the voters of said county, at an election held for that purpose in the several townships in said county; and afterwards, in accordance with the wishes of the votes of said county as expressed at the said election, to wit, on the 25th day of October, 1850, the said subscription was made by the defendants, and in part payment thereof afterwards, to wit, on the 1st day of March, 1852, the bonds and coupons in the said declaration mentioned were issued; wherefore the plaintiff says that the said bonds and coupons in said declaration mentioned were issued by the defendants upon

a contract made and entered into prior to the 1st day of November, 1851, and were not issued in violation of the constitution of the State of Indiana, and are legal and valid, and this the said plaintiff is ready to verify; wherefore he prays judgments, &c.

N. C. McLEAN,
Attorney for Plaintiff.

Demurrer to 2d and 6th pleas.

And the said plaintiff as to the said plea of the said defendants by them severally above pleaded, saith that the same and the matters therein contained, the manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendants, and that he the said plaintiff is not bound by law to answer the same; and the plaintiff alleges the following for cause of demurrer:

1st. That the defendants have not by their plea traversed or denied or attempted to put in issue any matter of fact alledged by the plaintiff, but has introduced and attempted to put in issue matters of fact not alledged nor necessary to be alledged.

2d. That the said plea is no answer to the declaration, and is generally defective.

And the said plaintiff as to the said plea of the said defendants by them sixthly pleaded, saith that the same and the matters and things therein contained, the manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendants, and that he the said plaintiff is not bound by law to answer the same; and for cause of demurrer the plaintiff alleges the following:

1st. The defendants have not by their plea traversed or denied or attempted to put in issue any matter of fact alledged by the plaintiff, but has introduced and attempted to put in issue matters of fact not alledged nor necessary to be alledged.

2. That the plea is no answer to the declaration, and is generally defective.

N. C. McLEAN,
Attorney for Plaintiff.

And the defendants say that said 2d and 6th pleas are sufficient in law.

McDONALD & PORTER.

And day thereof is given—

And on the 2d day of June, in the year aforesaid, that being the 14th judicial day of the May term of said court, before the same judges as aforesaid, come now the parties, and after argu-

ment heard on dem'r heretofore filed, day thereof is given the parties.

And this cause was continued from day to day for further argument, until the 6th day of June in the year aforesaid, being the 18th judicial day of said term, before the same judges as aforesaid, come now the parties, by their attornies, and the court being sufficiently advised, sustain the dem'r heretofore filed, to the 2d and 6th pleas heretofore filed; whereupon the joinder is withdrawn and leave is given to amend, and the defendant files his dem'r to the replication, in these words and figures, to wit:

And as to the replication by the pl'tff. above pleaded to the plea of the defendants thirdly above pleaded, the defendants say actio non, because they say that said replication and the matters therein contained, are not sufficient in law for the plaintiff to have and maintain against them the said action; wherefore, &c.

And for cause of demurrer, the def'ts state the following, to wit, that said replication improperly concludes to the country.

4. And as to the replication of the plaintiff to the plea of the defendant fourthly above pleaded, the defendants say actio non, because they say that said replication is not sufficient in law for the plaintiff to have or maintain his action aforesaid against them; wherefore, &c. And for cause of dem'r the def'ts state that said replication improperly concludes to the country.

5th. And as to the replication of the plaintiff to the plea of the defendants fifthly above pleaded, and whereof he hath put himself upon the country, the defendants do the like.

7. And as to the replication of the pl'tiff to the plea of the defendants 7thly above pleaded, they say that the same replication is not sufficient in law for the plaintiff to have or maintain his action aforesaid against them; wherefore, &c. And for special cause of demurrer the defendants set down the following, to wit, that said replication improperly concludes to the country.

HOVEY, THURMAN, McDONALD & PORTER,
Def. Atty.

And day is given.

And on the 8th day of June, in the year aforesaid, the plaintiff filed his replication to def'ts 2d plea as amended, in these words and figures, to wit:

And the said plaintiff as to the said amended plea of the said defendants by them secondly above pleaded to the said declaration, saith that he, by reason of anything by the said defendants in that amended plea alledged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendants, because he says that the bonds and coupons in the declaration mentioned, were issued by the defendants in pursuance of an election and vote of the majority of the voters voting

at said election in the said county of Knox, held and had in said county, to determine whether said county should take and subscribe stock in the said Ohio and Mississippi Railroad Company, pursuant to the act of January 15th, 1849; and that notice of said election and the purpose of said election, was given by the sheriff of said county prior to the date of said election, and in *according* to the provisions of the statute in such case made and provided, and this the plaintiff prays may be enquired of by the country, &c.

N. C. McLEAN,
Att'y for Pl'tiffs.

And the defendants do the like.

McDONALD & PORTER,
Def'ts Att'ys.

And also on the same day filed their dem'r to replication to 4th plea, in these words and figures following, to wit:

And as to the replication, the plea of the def'ts 4thly above pleaded, they say actio non, because they say that said replication and the matters therein contained are not sufficient in law; wherefore they pray jud't, &c.

McDONALD & PORTER,
Def'ts Att'ys.

And the plaintiff comes and says that the said replication fourthly pleaded is sufficient in law, &c.

N. C. McLEAN,
Att'y for Pl'tiff.

And also filed their rejoinder to rep'n to seventh plea.

And as to the replication of the plaintiff to the plea of the defts 7thly above pleaded, they say actio non, because they say that in the said court of the board of commissioners of the county of Knox, there is no record of any such proceedings by said board as are in said replication mentioned; wherefore, &c.

McDONALD & PORTER,
Att'y for Def's.

WALLACE
vs.
BOARD OF COM'RS OF THE COUNTY OF KNOX.

And for answer to the above rejoinder the pl'tiff says there is such record remaining in the records of the said board of commissioners, and this he prays may be inquired of by the court; and the def't does the like.

N. C. McLEAN,
Att'y for Pl'tiff.

And after argument heard thereon, and the court being sufficiently advised in the premises, overrule the dem'r to the 4th replication filed; and the issue of nul tiel record having been submitted to the court and decided in favor of the plaintiff, and thereupon the issue being joined, a jury is called to try the issue, and come, to wit: (1,) Jesse Price, (2,) Thomas F. Stout, (3,) Carlisle Vanlandingham, (4,) Thomas Morrow, (5,) Elias N. Sheimer, (6,) Alphonso H. Bryan, (7,) David Stout, (8,) David Snyder, (9,) Daniel Moore, (10,) Jacob Kunkle, (11,) Elijah James and (12) Joseph R. Klingensmith, twelve good and lawful men of the district of Indiana, who being empanneled and sworn to well and truly try the issue joined, after hearing the evidence, the argument of counsel, and receiving the charge of the court retire to their room, and after due deliberation had *return* into court the following verdict, to wit: "We the jury find for the plaintiff, and assess his damages in the sum of four thousand two hundred and eighty-seven dollars and five cents, ($4,287 05.)

JESSE PRICE,
Foreman.

It is therefore considered by the court that plaintiff have and recover of and from said defendant the said sum of *of* four thousand two hundred and eighty seven dollars and five cents, ($4,287 05,) so found by the jury to be due as aforesaid, as also the sum of dollars and cents, their costs and charges in and about this suit in this behalf expended.

And the defendants filed their bill of exceptions in these words and figures, to wit:

DAVID C. WALLACE
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX. } Assumpsit No. 29.

Be it remembered, that on the trial of this cause before the jury and court, the plaintiff, to maintain issues herein joined, produced and proved the signatures to 40 bonds, with the coupons thereto attached; and proved also that the seals affixed to each of said bonds was the county seal of Knox county; each of which bonds, with the coupons thereto attached, (except that they are respectively numbered 14 to 43, inclusive,) is in the words and figures following, to wit:

United States of America. State of Indiana, county of Knox.

$1,000. $1,000.

Ohio and Mississippi Railroad Co.

The county of Knox acknowledges itself indebted to the Ohio and Mississippi Railroad Company, or bearer, in the sum of one

thousand dollars, negotiable and payable at the North River Bank, in the city of New York, twenty-five years from date thereof, upon the presentation and delivery of this certificate, bearing an interest of six per cent. per annum, payable annually on the first day of March at said bank in the city of New York, upon presentation and delivery of the proper coupons hereto attached, signed by the auditor of said county.

This bond is issued in part payment of a subscription of two hundred thousand dollars, by the said county of Knox, to the capital stock of the Ohio and Mississippi Railroad Company, by order of the board of county commissioners, on the 25th day of October, 1850, in pursuance of the third section of "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," passed by the General Assembly of the State of Indiana, and approved January 15th, 1849.

Witness the seal of the said county of Knox, and the signatures of the president of the board of commissioners and the auditor of said county, this first day of March, 1852.

JAMES POLKE,
President of the Board of County Commissioners for Knox county, Indiana.

[SEAL.]

ABM. SMITH,
Auditor of Knox county, Indiana.

And each of which coupons, so attached to each of said bonds, was and is (with the exception that they are respectively payable, one on the first day of March every year, from the year 1853 to the year 1877, inclusive,) in the words and figures *and* following, to wit:

Ohio and Mississippi R. Road subscription, $200,000.

County of Knox, Indiana, will pay the bearer sixty dollars, at the North River Bank in the city of New York, on the 1st day of March, 1853, being the annual interest on bond No.

$60. ABM. SMITH.

Be it also remembered, that the plaintiff produced and offered in evidence before said jury on said trial a transcript purporting to be copied from the records of the board of commissioners of Knox county; which transcript is in the words and figures following, to wit:

"At a meeting of the board of commissioners of Knox county, begun and held at the court-house in Vincennes, on Monday, the 26th day of February, 1849, pursuant to the above notice:

Members present: Samuel Emison, William Junkins; and James Polke having produced his certificate of appointment, being duly qualified, took his seat as a member of this board.

Whereupon, it was ordered by the board that the county of Knox subscribe two hundred thousand dollars to the capital stock of the Ohio and Mississippi railroad.

Ordered, That the above order be published in the papers of Vincennes.

Ordered, That the board do now adjourn sine die.

STATE OF INDIANA,
Knox county, Friday, three o'clock p. m., Oct. 25, 1850.

The board of commissioners of said county convened at the court-house in Vincennes, in accordance with the notice of the auditor of the county aforesaid, duly served on them by the sheriff of said county, to make a subscription on behalf of said county to the Ohio and Mississippi Railroad Company, and in accordance to and with the wishes of the votes of said county, as expressed at the election held for that purpose in the several townships of said county, on the first Monday in March, 1849. Members present: William Junkins, James Polke, and Andrew Gardner, commissioners. Also present, William T. Scott, sheriff of Knox county, and Abraham Smith, auditor. In the matter of the Ohio and Mississippi Railroad Company, now at this time, it is ordered by the board of commissioners of the county of Knox, and State of Indiana, that the auditor of said county, in the name and for the county of Knox, subscribe to the capital stock of the Ohio and Mississippi Railroad Company four thousand shares of fifty dollars each, or the sum of two hundred thousand dollars; and that said auditor is hereby authorized and required to issue the bonds of said county to said railroad company, in accordance with the third section of an act to amend an act to incorporate the Ohio and Mississippi Railroad Company, approved January 15th, 1849; provided, however, that the proceeds of said bonds shall only be applied to the construction of said railroad eastwardly from Vincennes, except so much thereof as may be necessary for incidental engineering expenses.

Be it further ordered, that said auditor be authorized to vote at all elections and meetings of stockholders, or to appoint his proxy in his place and stead.

Ordered, That the board do now adjourn sine die.

WILLIAM JUNKINS, *Pres.*

At a meeting of the board of commissioners of Knox county, in the State of Indiana, held at the court-house in Vincennes, in said county, on Monday, the 9th day of May, 1853, pursuant to the above notice; members present, Andrew Gardner, William Junkins, and James Scott.

Whereas, it being deemed important to the speedy prosecution and construction of the Ohio and Mississippi railroad, which is

contracted to be completed from Vincennes to the Salem and New Albany railroad within a period of eighteen months, that the bonds of the county to be issued on the subscription of stock in the Ohio and Mississippi Railroad Company should be issued at an early day; that the company negotiate the same, and use the proceeds in the construction of said road. Now, therefore, be it resolved, that upon the requisition of the Ohio and Mississippi Railroad Company, the auditor of Knox county issue the remaining bonds, or such part as may be required in the payment of stock of said railroad company."

Which said transcript was duly certified as a true copy from the record in the auditor's office of said county.

Be it also remembered, that it was admitted on the trial of said cause by the plaintiff in open court, that said transcript is all that appears on the records of the board of commissioners of the county of Knox in any way relating to said bonds and coupons or to said subscription of stock, or to the subscription of stock hereinafter copied.

Be it also remembered, that on the said trial the pltff. produced before the jury, first duly proving the seal and signature thereto, the following subscription of stock in a subscription book of said railroad company, to wit:

I, Abm. Smith, auditor of Knox county, in pursuance of the foregoing, for and on behalf of the county of Knox, in the State of Indiana, do hereby subscribe in the capital stock of the Ohio and Mississippi Railroad Company four thousand shares of fifty dollars each, amounting to the sum of two hundred thousand dollars.

In testimony whereof, I have hereto subscribed my name and affixed the seal of the comrs. court at Vincennes, this 25th day of October, A. D. 1852.

[SEAL.] ABM. SMITH, *A. K. Co.*

Above which said subscription in said book, were copied all the orders in the above copied transcript of a date prior to the 25th day of October, 1850.

Be it also remembered, that on the trial of the said cause, the plaintiff produced and offered to read in evidence to the jury a paper, of which the following is a copy, to wit:

Election notice.

Notice is hereby given, that an election will be held at the usual place of holding elections in Knox county, on Monday, the 5th day of March, 1849, at which the qualified voters of Knox county will determine by vote what, if any, amount of stock in the Ohio and Mississippi Railroad Company the county commissioners of said county will subscribe for in behalf of said county. Those in favor of subscription will write upon their ballots the word "sub-

scription:" those opposed to the subscription, will write "no subscription."

(Signed) W. T. SCOTT, *Sheriff.*

VINCENNES, *Feb.* 8, 1849.

STATE OF INDIANA, *Knox county, ss.*

On the 3d day of June, 1857, personally appeared before me the undersigned, notary public in and for said county and State, Richard W. Caddington, who being by me duly sworn, says that the notice of which the above is a true and perfect copy, was published for three weeks successively in the Vincennes Gazette, a weekly newspaper of general circulation in Knox county, Indiana; and that the first of said publications appeared in said newspaper on the (15) fifteenth day of February, 1849, the second on the (22) twenty-second day of February, 1849, and the third on the (29) twenty-ninth day of February, 1849; and affiant further says that he was then the publisher and proprietor of said newspaper.

R. Y. CADDINGTON.

Subscribed by said Caddington, and sworn to before me this 5th day of June, 1857. In testimony whereof, I have hereto set my hand and notarial seal at *Vincenes.*

[SEAL.]

J. C. DENNY, *N. P.*

And without any other proof of the genuineness or authenticity of the above copied paper, (writing,) the plaintiff offered to read the same to the jury in evidence; to which evidence the defendants objected, on the ground that said paper was incompetent evidence of the notice it is offered to prove; but the court overruled said objections, and permitted said paper to be read to the jury, and the same was read accordingly. To which opinion of the court in overruling said objections and allowing said paper to be so read, the defendants then and there excepted.

Be it further remembered, that in the trial of said cause the plaintiff read in evidence a transcript duly certified under the hand and seal of the clerk of the Knox circuit court, which transcript is in the words and figures following, to wit:

Abstract of the votes given for and against subscription to the capital stock of the Ohio and Mississippi railroad by the county of Knox, in the State of Indiana, at an election held in said county on Monday, the fifth day of March, 1849, for that purpose:

Townships.	Subscription.	No subscription.	Total.
Busseron,	53	16	69
Widner,	48	1	49
Vigo,	31	61	97
Washington,	141	2	143

Townships.	Subscription.	No subscription.	Total.
Palmyra,	126	11	137
Harrisson,	90	11	101
Johnson,	51	16	67
Decker,	12	3	15
Wane,	12	11	21
Vincennes,	366	–	366
Total,	930	132	1,062

STATE OF INDIANA, *Knox county, ss:*

We, the undersigned, inspectors and judges of each township of the above election, assembled at the court-house in Vincennes on Wednesday, the 7th day of March, 1849, between the hours of twelve at noon and four o'clock in the afternoon. After being organized as a board of canvassers by selecting Henry D. Wheeler as chairman and William R. McCord, clerk of the circuit court of Knox county, Indiana, acting as clerk of said board, and after having canvassed and estimated the certificates, poll lists, and tally papers returned by each member of said board of canvassers, do hereby certify that at said election there was nine hundred and thirty votes for subscription and one hundred thirty-two votes against subscription.

Given under our hands and seals this 7th day March, 1849.

H. D. WHEELER, [SEAL.]
JOHN W. WIDNER, [SEAL.]
HENRY JOHNSON, [SEAL.]
J. HOGGE, [SEAL.]
GEORGE SIMPSON, [SEAL.]
CHARLES McCLURE, [SEAL.]
JOSEPH LAPLANT, [SEAL.]
S. E. MILLS, [SEAL.]
JOHN SMITH, [SEAL.]
JACOB P. COLT. [SEAL.]

Attest:
W. R. McCORD, *Clerk.*

Be it further remembered, that all the documents above in this bill of exceptions copied, were read to the jury on said trial, and were the only evidence, either record or documentary, which was read on said trial.

Be it also remembered, that the plaintiff offered parol evidence tending to prove that Abram. Smith, mentioned in the transcript first above copied, had appointed Samuel Judah his proxy to vote the stock vote of the def'ts, at meetings of the directory of said railroad company, and that said Judah had so voted.

Be it also remembered, that after said evidence was given, and before the jury retired from the bar, the defendants prayed the

court to instruct the jury, "that to entitle the plttff. to recover, he must show by the records of the Board of Commissioners of Knox county, that they authorized Abm. Smith, whose name appears to the coupons, to make and issue the same; and that the transcript of the proceedings of said board, shown in evidence by the plaintiff, is no sufficient evidence of such authority to said Smith." Which instruction the court refused to give, and instructed the jury that the transcript of the record given in evidence by the plaintiff is sufficient to show the authority of said Smith.

2. The defendants also then and there prayed the court to instruct the jury that the transcript of the record of said board of commissioners, as shown in evidence by the plaintiff, is not conclusive evidence of any authority to said Smith to make and issue said coupons." Which instruction the court refused to give, but instructed the jury that the bonds provided for the coupons, and the auditor had authority to issue them.

3. The defendants also then and there prayed the court to instruct the jury, "that if the jury should believe from the evidence that the bonds and coupons named in the declaration were made and issued solely pursuant to an order made on the 26th day of Feb., 1849, by the defendants on their records increasing an intended subscription of stock in the Ohio and Mississippi Railroad Company from $100,000 to $200,000, and that no notice was given of such increase of said intended subscription was given at the different precincts of the county of Knox, on the first Monday of March, 1849, and that the people of Knox county, without such notice, voted for subscription of stock in said railroad company, (under the act of 15 Jan., 1849, named in the declaration,) on the first Monday of March, 1849, and at no other time; and that upon such vote and solely pursuant thereto, the subscription shown in evidence was made, and that the bonds and coupons named in the declaration were made and issued solely in consideration of said subscription, and pursuant to said vote, the jury should find for the defendants." Which instruction the court refused to give, and instructed the jury "that from the fact of the increase of subscription, as appears upon the record of the commissioners, this subscription of the $200,000, as also appears in the record from the order on the record, that notice be given of the increased subscription in the Vincennes paper. From the fact proved that an agent was appointed to represent the stock of the county at two or three meetings of the stockholders, and actually voted the stock of the county, the jury will presume from these facts as an inference of law, that the notice was given on the day of the election, the present plaintiff being a stranger to the transaction, the bonds and coupons being payable to 'bearer;' and that the notice of the election, as given by the sheriff and proved by the publisher of the Vincennes Gazette, (above copied, if the jury believe the

affiant thereto,) was a sufficient notice under the statute; and that all errors and omissions of duty by the commissioners prior to the subscription of stock or the issuing of the bonds, should have been corrected by an appeal or certiorari, an acquiescence of seven or eight years, while the bonds pass into the hands of innocent holders, under the circumstances above stated, authorize the presumption of law above stated.

4. The defts. then and there also prayed the court to give the jury the following instruction, to wit: That if from the evidence the jury should believe that the newspaper notice shown in evidence, (as above copied,) is the only notice ever given by the sheriff of Knox county or by the board of commissioners of that county, touching an election by the people to determine whether said county should take stock in said road, to be held on the first Monday of March, 1849, and that no other election for that purpose was ever held at any other time, the jury should find for the defendants; which instruction the court refused to give.

5. The defts. then and there also prayed the court to give the jury the following instruction, to wit: That if the jury believe from the evidence that the bonds and coupons named in the declaration and shown in evidence were issued pursuance and in consideration of stock in the Ohio and Mississippi Railroad Company, that within a week next before the first Monday of March, 1849, the board of commissioners of Knox county had ordered the subscription of $100,000 authorized by the act of Jan. 15th, 1849, named in the declaration, to be raised to $200,000; that no notice of such increase of subscription was ever given at the different precints of said county on the first Monday of March, 1849; and that no election by the people of said county on the subject of a subscription of stock in said company was ever held, except on the first Monday of March, 1849, the jury should find for the defendants." Which instructions the court refused to give, for the reasons above by the court given.

6. The defts. then and there also prayed the court to instruct the jury as follows, to wit: That the notice proved as having been given by advertisement in the Vincennes Gazette, is not sufficient evidence of such notice as was required by act of Jan. 15, 1849, mentioned in the declaration of the holding of an election on the first Monday of March, 1849, to be given by the sheriff of Knox county." Which instruction the court refused to give.

7. The court was also then and there prayed by the defendants to instruct the jury as follows, to wit: "That in this case the burden of proof devolves on the pltff. to show the regularity of the notices in the act of Jan. 15th, 1849, required as a prerequisite of a voting by the people, especially to show that such notice was given by manuscript advertisements in the several townships of Knox county, and to show that said Smith had due authority to issue the coupons mentioned in the declaration; and if the

pltff. has failed to make such proof, the jury should find for the defendants." Which instruction the court refused to give, except as the court had above charged the jury.

8. The defts. also prayed the court to instruct the jury then and there "that the act of Jan. 15, 1849, required the sheriff of Knox county, forthwith after its passage, to give notice of an election to be held therein on the first Monday of March, 1849, to determine whether said county should subscribe stock in the Ohio and Mississippi Railroad Company; and that the publication in the Vincennes Gazette, as shown by the oath of Richard Y. Caddington, above copied, was not of itself a substantial compliance with the requirements of said act as to such notice." Which instruction the court refused to give, except as above by the court given.

9. The defendants then and there also prayed the court to instruct the jury as follows, to wit: "That the notice provided for in the proviso to 2nd section of act of Jan. 15, 1849, mentioned in the declaration, is and was a notice which must have been given at the different precincts of said county of Knox, on the first Monday of March, 1849, and could not be supplied by any notice given at any other place or at any other time." Which instruction the court refused to give, except as by the instruction aforesaid given by the court.

10. The defendants then and there also prayed the court to instruct the jury as follows, to wit: That the provisions of the act of Jan. 15th, 1849, named in the declaration, requiring notices to be given and the bonds therein named to be issued at the rate of one-fifth each year, are imperative, and not directing merely; and that if the bonds named in the declaration were issued at a greater rate than one-fifth each year, the bonds thus excessively issued are void, and the coupons thereto attached are alike void. Which instructions the court also refused, and on the contrary instructed the jury that as to "the issue of the bonds as stated in the above instructions, (No. 10,) the law was mandatory as to the issue of one-fifth of the bonds annually, but there was no prohibition of any farther issue; and that a further issue within any one year of more than one-fifth, if done in good faith, to advance the interest of the country, such bonds, in the hands of the present owner and bearer who has brought this suit, and who took them without notice, are not void.

To each and every one of which opinions of the court in so refusing to give the instructions so prayed as aforesaid by the defendants, they, the defendants, at the time of each of said rulings, excepted; and to the giving of each of the instructions by the court so given as aforesaid, the defendants, at the time of the giving of the same, excepted; and they pray that this their bill of exceptions be signed, sealed by the court, and made a part of the record herein, which is done.

JOHN McLEAN. [SEAL.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the seventh circuit, and the district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court for the district aforesaid, between David C. Wallace and the Board of Commissioners of the county of Knox, a manifest error hath happened, to the great damage of the said Board of Commissioners of the county of Knox, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties in this behalf, you are hereby commanded, if judgment be therein given, that then, distinctly and openly, you send, under your seal, the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventh day of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what may be right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-first.

H. BASSETT, *Clerk.*

I allow the above writ of error, June 12, 1857.

E. M. HUNTINGTON.

Know all men by these presents, that the undersigned are held and firmly bound unto David C. Wallace in the sum of five hundred dollars, to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated June 12, 1857.

Whereas the Board of Commissioners of the county of Knox has prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered by the circuit court of the United States for the district of Indiana, at its May term, 1857, in a cause in which said Wallace was plaintiff and said board was defendant:

Now, therefore, if said board of commissioners shall prosecute the said writ of error to effect, and answer all costs on failure so

to prosecute said writ of error, then this bond shall be void, else remain in full force.

J. N. EARTHAM, [SEAL.]
JAMES DICK, [SEAL.]
WM. BURTCH, [SEAL.]

Attest: ABNER T. ELLIS.

Approved Aug. 7th, 1857.

E. M. HUNTINGTON, *Judge.*

UNITED STATES OF AMERICA, *ss:*

To David C. Wallace:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the seventh circuit and district of Indiana, wherein the Board of Commissioners of the county of Knox is the plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Elisha M. Huntington, one of the judges of the said circuit court for the district of Indiana, this 12th day June, in the year of our Lord eighteen hundred and fifty-seven.

E. M. HUNTINGTON.

I acknowledge service of the above.

D. C. WALLACE.

DISTRICT OF INDIANA, *ss:*

I, Horace Bassett, clerk of said circuit court, do hereby certify the above and foregoing to be a true and complete transcript of the record in the above entitled case, together with the writ of error and the appeal bond, with the citations attached hereto, and also the cost of this appeal, taxed and allowed by the court, at eight dollars and seventy-six cents.

In witness whereof, I have hereto set my hand and affixed the [SEAL.] seal of said circuit court, at Indianapolis, this 22d day of August, eighteen hundred and fifty-seven.

HORACE BASSETT, *Clerk.*

THE BOARD OF COMMISSIONERS OF KNOX COUNTY *vs.* DAVID C. WALLACE. } In error.

The said plaintiffs in error say that in the judgment and pro-